IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 527

EUGENE T. SINGER,

Petitioner,

against

THE YOKOHAMA SPECIE BANK, LIMITED,

Defendant,

and

ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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Citations

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Statement.

Respondent, the Superintendent of Banks of the State of New York, heretofore filed a petition in this Court (No. 512) for review of the decision of the Court of Appeals of the State of New York in *Singer* v. *Yokohama Specie Bank, Ltd.*, insofar as it held that the provisions of Execu-

tive Order No. 8389 did not render void a claim arising out of a transaction prohibited by that Order. Plaintiff in that action has now filed a cross-petition in which he seeks review of that portion of the decision which held that a license of the transaction underlying plaintiff's claim is required before payment can be made to plaintiff. This brief is submitted in opposition to the cross-petition.

Facts.

The facts with respect to the questions under discussion were summarized at pages 4 to 8 of the Superintendent's petition (No. 512), and accordingly will not be repeated here.

POINT I.

There is no occasion for this court to pass upon the respective roles of the Secretary of the Treasury and the Alien Property Custodian.

Plaintiff has devoted a very large portion of his brief to a discussion of the powers of the Secretary of the Treasury vis-a-vis the Alien Property Custodian, with respect to property over which the Custodian has asserted jurisdiction. The fact that the powers of both of these officials are now, and have been for the past year and a half, vested in a single official, the Attorney General of the United States, renders this issue of comparatively little general interest.*

* The transfer of the powers of the Alien Property Custodian to the Attorney General was made effective on October 15, 1946 by Executive Order No. 9788 (11 F. R. 11981). The transfer to the Attorney General of the powers of the Secretary of the Treasury with respect to the administration of Executive Order No. 8389 was made on August 20, 1948 (effective September 30, 1948) by Executive Order No. 9989 (13 F. R. 4891).

At any rate, it is wholly immaterial whether the power to license this transaction resided in the Secretary of the Treasury or the Alien Property Custodian, for it is clear that the mere assumption of control by the Alien Property Custodian over the property of the Agency did not annul the prohibitions of Executive Order No. 8389 or validate transactions theretofore prohibited by that Order. One or the other of these Federal officers still had to license the transaction and since, as will be seen, neither has done so, it is wholly immaterial for the purpose of this case which of them had that power. "Only by doing violence to both the language of the order and the spirit of the Federal controls system and its regulations, could we conclude that the surrender of Treasury supervision to the Custodian was intended to defrost, at one stroke, all of the frozen accounts of enemy nationals" [R. 537].*

Wholly apart from the foregoing, the following comments should be made with respect to the arguments advanced by plaintiff.

FIRSTLY, it seems clear that the nature and extent of any release of control by the Secretary of the Treasury *in this case* is to be determined by the terms of the document supposedly effecting it. The letter of October 29, 1942, the document in question, did not purport to release all control. It did not provide that the Superintendent was

* Not only did the prohibitions of Executive Order No. 8389 survive the assumption of supervisory jurisdiction by the Custodian, but in addition when the Custodian assumed such supervisory powers he imposed further controls prohibiting "All transactions, involving any * * * (supervised) property, or by, or with, or on behalf of, or pursuant to the direction of, any business enterprise" of which he undertook supervision, except as specifically authorized by him or his representatives (7 F. R. 8910). To the same effect; see 8 F. R. 6694, 8 F. R. 12839, 9 F. R. 4485 and General Order No. 31—9 F. R. 7739.

thenceforth freed from the necessity of complying with the provisions of Executive Order No. 8389, nor that he was authorized, insofar as Executive Order No. 8389 was concerned, to engage in any transaction whatsoever. On the contrary, the letter explicitly limited the release of control by providing that [R. 380]—

> "In view of (the Supervisory) order, you are authorized by the Treasury Department, so far as Executive Order No. 8389, as amended, is concerned, to engage in any transaction on or after October 29, 1942, *which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country.*" (Italics supplied.)

SECONDLY, it must be observed that Section 12 of Executive Order No. 9193 deprives the plaintiff of the power to challenge the exercise by the Secretary of the Treasury of powers entrusted to the Custodian. This Section provides as follows:

> "12. Any orders, regulations, rulings, instruction, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges, and powers conferred on the President by sections 3(a) and 5(b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301

and 302 of title III of the First War Powers Act, 1941, approved December 18, 1941. No persons affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa."

POINT II.

The documents in evidence, at best, merely permit payment of valid claims and do not purport to validate past transactions or to authorize payment of claims which had not accrued.

In considering the questions here presented, it is to be noted that plaintiff's arguments are all predicated upon the assumption that the Court of Appeals properly held that plaintiff's claim was entitled to recognition in the New York liquidation. The propriety of this holding is called into question by the Superintendent's application for a writ of certiorari (No. 512). If the Superintendent is correct in his view on the latter question, then it will follow that the arguments advanced by plaintiff have even less force in this Court than they had in the Court of Appeals.

Thus, the documents upon which plaintiff relies at most authorize the Superintendent in general terms to pay certain creditors of the Agency. These documents cannot be interpreted as licensing the "creation" or "accrual" of a claim.

They merely license the payment of claims *otherwise* valid and enforcible. The fact that the Superintendent is authorized to pay such claims is of no help to plaintiff since plaintiff's claim is not of this nature. In other words, it is our view that, in the absence of a license authorizing the transaction, plaintiff never became a creditor of the Agency, and it is therefore immaterial whether the Superintendent was authorized to pay such creditors, or whether such authorization to pay emanated from the Secretary of the Treasury or from the Alien Property Custodian.

A brief reference to the documents upon which plaintiff relies (Petition, p. 18) will perhaps make this point clearer. The license of January 14, 1942 [Ex. 15, R. 375 (228)]* authorizes the Superintendent to

> "make payments to depositors * * * and to perform all other acts appropriate to the orderly liquidation of the assets, property and business in the State of New York of the * * * Yokohama Specie Bank, Limited".

The license contains a stipulation which excluded from its operation transactions involving a blocked national other than the bank in liquidation. The Court of Appeals held that this stipulation alone excluded the transaction in suit [R. 534]. But even apart from the stipulation it is clear that the license authorizes no more than the payment of claims entitled to recognition in the liquidation of the Agency. Nothing in the license purports to authorize the creation of a new claim or to validate a transaction which took place long prior to the commencement of the liquidation.

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* References in brackets are to pages of the Record on Appeal. Parentheses within the brackets are to pages of the Record at which the exhibits referred to were offered in evidence.

In this connection paragraph "18" of General Ruling No. 4 provides that—

> "No license or other authorization issued by or under the direction of the Secretary of the Treasury pursuant to the Order or sections 3(a) or 5(b) of the Trading with the enemy Act, as amended, shall be deemed to authorize or validate any transaction effected prior to the issuance thereof, unless such license or other authorization specifically so provides".

Clearly the license of January 14, 1942, did not "specifically" provide for the licensing of the transaction upon which plaintiff's claim is based.

The second document upon which plaintiff relies is the letter from the Secretary of the Treasury to the New York Agency dated October 29, 1942 [Ex. 17, R. 380 (229)]. This letter is equally immune to the suggestion that it served to validate the transaction of August 29, 1941. This letter informed the Agency that—

> "you are authorized by the Treasury Department, so far as Executive Order No. 8389, as amended, is concerned, to engage in any transaction on or after October 29, 1942 which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country."

Manifestly, the Secretary of the Treasury did not intend by this letter to "validate, willy-nilly and in gross, all * * * transfers, irrespective of how illegal may have been their source, regardless of how illicit may have been their purpose" [R. 538]. At the most, the letter permitted the payment of otherwise valid claims out of the property of the Agency, without regard to the fact that such property had been frozen. The terms of the letter, and the provi-

sions of General Ruling No. 4 (18), *supra*, both indicate that it was intended to be prospective in its operation. Nothing contained therein indicates that it was intended to validate past transactions or authorize the creation of new claims. Furthermore, as indicated below, even if the letter were intended to have retrospective effect, payment by the Agency to effectuate a transaction involving other blocked nationals is not a transaction which might be engaged in by a person who is not a national of any blocked country.

The third of the documents upon which plaintiff places reliance is the Supervisory Order issued by the Alien Property Custodian on September 18, 1942 [Ex. CC, R. 482 (333)]. This document merely states that the Custodian—

> "• • • undertakes the supervision to the extent deemed necessary or advisable from time to time by the undersigned of such New York branch of said business enterprise and of all property of any nature whatsoever owned or controlled by, payable or deliverable to, or held on behalf of or on account of or owing to, said branch, • • •."

This document does not deal in any way with the question under consideration. Nothing contained therein purports to validate prohibited transactions of any nature whatsoever.

The fourth document cited by plaintiff is the letter from the Alien Property Custodian to the Superintendent dated September 28, 1942, [Ex. 16, R. 378 (228)] in which the Custodian informed the Superintendent that he had undertaken supervision of the Agency. In this letter the Custodian authorized the Superintendent to "continue to retain possession of and liquidate" the Agency and to "do such acts and perform such duties as may be required of or per-

mitted to you by and in accordance with and subject to the provisions of the Banking Law of the State of New York." In other words, the letter authorized the Superintendent to continue the liquidation and to pay the creditors entitled to be paid. But it is clear that plaintiff at the time this letter was issued had no right to be paid in the liquidation for his claim was founded upon a prohibited transaction. Nothing in the letter lends any color to the contention that it was intended to validate the transaction upon which plaintiff's claim is based.

Plaintiff has sought to found an argument upon the later provision in the letter that—

> "You are also requested to notify the undersigned when you have liquidated assets sufficient to produce funds necessary to pay, and there have been paid, all the accepted or established claims of creditors whose claims arose out of transactions had by them with the New York branch of such business enterprise, or whose names appear as creditors on the books of such branch, together with interest thereon and the expenses of liquidation, so that the undersigned may take such action at that time with respect to the assets remaining in your hands as he may deem necessary in the interest of the United States."

There is nothing in the foregoing paragraph to indicate, however, that the Custodian intended by it to enlarge the category of claims entitled to share in the liquidation prior to the issuance of this document.

The final document upon which plaintiff relies is the Vesting Order issued by the Custodian on February 15, 1943 [Ex. DD, R. 485 (333)]. This document served the function of vesting the surplus remaining after the payment of persons holding claims entitled to be paid in the liquida-

tion of the Agency. Since, on our view of the law, the claim asserted by plaintiff in this action never came into existence, the Order does not affect him one way or the other. Certainly there is nothing in it purporting to validate the transaction upon which his claim is based.

The foregoing argument may be summarized as follows: When the Superintendent took possession of the Agency on December 8, 1941, the plaintiff had no claim entitled to be recognized in the liquidation, because the transaction upon which his claim was based fell within the prohibitions of the Executive Order, and no license had ever been obtained validating this transaction. Thereafter the Secretary of the Treasury and the Custodian issued certain documents authorizing the Superintendent in general terms to carry on the liquidation of the Agency and to utilize its funds for the payment of claims entitled to share therein. None of these documents purported, or was intended,* to license the creation of new claims or validate transactions taking place before the liquidation commenced. Hence it follows that the transaction underlying plaintiff's claim has never been licensed and the claim has never been validated.

POINT III.

Payment of plaintiff's claim has not been authorized even if the claim be viewed as properly established.

As stated above, if this Court accepts the view set forth in our petition as to the effect of the Executive Order upon

* Both the Secretary of the Treasury and the Office of Alien Property, the only Federal authorities authorized to issue licenses, have consistently denied throughout this litigation that the transaction upon which plaintiff's claim is based has been authorized or payment licensed.

transactions falling within its scope, the premise upon which all of plaintiff's arguments are founded is destroyed. It is important to point out, however, that even if it is assumed, as the Court of Appeals assumed, that plaintiff's claim is a valid and enforcible one, nevertheless the plaintiff's arguments that payment of its claim has been licensed are without merit. The absence of merit in the plaintiff's position in this respect is fully demonstrated in the opinion of the Court of Appeals and, accordingly, we think it unnecessary to repeat here at length the reasoning on which the Court of Appeals reached its conclusion that payment had not been licensed.

The basis of this holding was the fact that both the Treasury license of January 14, 1942 and the Treasury letter of October 29, 1942 limited the class of transactions which might be engaged in without specific licenses under Executive Order No. 8389. Payment of a claim based upon a transaction prohibited by the Executive Order for reasons other than the fact that the Agency itself was a Japanese national was not authorized by these documents. Thus the letter of January 14, 1942, except... transactions involving a blocked national other than the bank in liquidation, and the letter of October 29, 1942 authorized only such transactions as might be engaged in by a person who was not a national of any blocked country. Neither authorized consummation of a payment made at the direction of blocked nationals other than the Agency (such as the Yokohama offices of Standard and of the Yokohama Specie Bank) nor transactions involving property of such nationals. Nor did the documents issued by the Custodian even remotely purport to constitute the licenses which the Court held were still required under Executive Order No. 8389.

As stated all of these matters were elaborately dealt with by the Court of Appeals and therefore shall not be discussed at length in this brief.

POINT IV.

The questions presented are of no general importance.

We believe we have shown that if the Superintendent is right in the position taken in his petition (No. 512), there can be no possible contention on the present record that the payment of this claim has been licensed. We think it equally clear, however, that even on the Court of Appeals' assumption that the plaintiff had an accrued claim, that court was right in holding that no license permitting payment of that claim has been issued. The petitioner asserts no conflict on this point with any decision of any court, and we are aware of none. The question whether the claim has been licensed turns primarily on the construction of various licenses, letters and other documents issued by the Secretary of the Treasury and the Alien Property Custodian. In holding that they did not constitute a license of the plaintiff's claim, the Court of Appeals has construed those documents in accordance with the construction that has been consistently placed on them by the Federal authorities issuing them, as well as by the Superintendent to whom a number of them were addressed. Accordingly, we believe that regardless of what action this Court takes on the Superintendent's petition (No. 512), the petitioner in No. 527 presents no question calling for a further review by this Court.

POINT V.

The petition should be denied.

It is respectfully submitted that for the foregoing reasons the plaintiff's petition for a writ of certiorari should be denied.

Respectfully submitted

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